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In The
Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,

Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor of the Bankrupt Estate of *In re Wallace's Bookstores, Inc.*, No. 01-50545 (Bkr. E.D. Ky.),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

MAUREEN RILEY MATSEN
Deputy State Solicitor General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for Petitioners

CARLA R. COLLINS
VALERIE L. MYERS
RONALD N. REGNERY
Associate State Solicitors General

December 29, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May Congress use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate the States' sovereign immunity?

PARTIES TO THE PROCEEDINGS

The Petitioners are four public institutions of higher education in Virginia – Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College.[1]

The Respondent is Bernard Katz, who is the Liquidating Supervisor of the bankrupt estate for *In re Wallace's Bookstores, Inc.*, No. 01-50545 (Bkr. E.D. Ky.). Katz commenced a bankruptcy adversary proceeding against each of the Petitioners.

[1] Like all public institutions of higher education in Virginia, the Petitioners are considered the Commonwealth of Virginia for purposes of sovereign immunity. *See Shepard v. Irving*, 204 F. Supp. 2d 902, 912 (E.D. Va. 2002); *University of Virginia v. Robertson (In re Robertson)*, 243 B.R. 657, 661 n.4 (W.D. Va. 2000) (bankruptcy appeal); *DeBauche v. Virginia Commonwealth Univ.*, 7 F. Supp. 2d 718, 722 (E.D. Va. 1998); *Thorpe v. Virginia State Univ.*, 6 F. Supp. 2d 507, 509 n.4 (E.D. Va. 1998).

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PETITION FOR WRIT OF CERTIORARI

Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College (collectively, "the Virginia Institutions"), by and through their counsel, Virginia Attorney General Jerry W. Kilgore, respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit. The court of appeals, relying on its previous decision in *Hood v. Tennessee Student Assistance Corporation (In re Hood)*, 319 F.3d 755 (6th Cir. 2003) (*Hood I*), *aff'd on other grounds,* 124 S. Ct. 1905 (2004) (*Hood II*), held that Congress may use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate the States' sovereign immunity. The court of appeals' decision is contrary to the decisions of five other Circuits and appears to conflict with the pronouncements of this Court. It also creates significant difficulty for the States. Certiorari should be granted.

OPINIONS BELOW

The panel decision of the court of appeals is unpublished but is reported as *Katz v. Central Virginia Community College (In re Wallace's Bookstores)*, 106 Fed. Appx. 341 (6th Cir. 2004) (*per curiam*). It is reprinted in the Appendix at 1. The decision of the U.S. District Court for the Eastern District of Kentucky is unpublished and unreported, but is reprinted in the Appendix at 3. The decisions of the U.S. Bankruptcy Court for the Eastern District of Kentucky also are unpublished and unreported, but are reprinted in the Appendix at 5 (Central Virginia Community College), 7

(Virginia Military Institute), 9 (New River Community College), and 11 (Blue Ridge Community College).[2] The decision of the Sixth Circuit denying rehearing *en banc* is unpublished and unreported. It is reprinted in the Appendix at 13.

JURISDICTION

The panel decision of the court of appeals was entered on August 4, 2004. The decision of the court of appeals denying the Virginia Institutions' petition for rehearing *en banc* was entered on September 30, 2004.[3] This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT UNDER RULE 29.4(b)

This proceeding questions the constitutionality of 11 U.S.C. § 106(a), which purports to abrogate the States' sovereign immunity for adversary proceedings in bankruptcy. Because neither the United States nor any agency, officer, or employee thereof is a party, the Virginia Institutions note that 28 U.S.C. § 2403(a) is applicable.

No court of the United States, as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the

[2] In the bankruptcy court, there were four separate cases – one against each of the institutions. The four appeals were consolidated in the district court and taken as one appeal to the court of appeals.

[3] The court of appeals stayed its mandate pending this Court's resolution of this Petition.

Attorney General of the United States the fact that the constitutionality of 11 U.S.C. § 106(a) has been questioned.[4]

A copy of this Petition for Writ of Certiorari has been served on the Solicitor General of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This petition involves the following constitutional and statutory provisions:

1. The Bankruptcy Clause of the United States Constitution, Art. I, § 8, cl. 4, states: "The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

2. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[5]

[4] On two separate occasions, the Virginia Institutions advised the court of appeals that they were challenging the constitutionality of a federal statute and that the Attorney General of the United States should be notified of the challenge. Apparently, the Attorney General was never notified.

[5] As this Court has observed,

> The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case,

(Continued on following page)

3. The Eleventh Amendment to the United States Constitution provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ."[6]

4. The federal statute at issue in this petition, 11 U.S.C. § 106(a), provides:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Section . . . 505 . . . of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such section or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery. . . .

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whether an incident of state sovereignty is protected by a limitation on an Article I power.

New York v. United States, 505 U.S. 144, 156-57 (1992). Moreover, the Tenth Amendment is not the exclusive textual source of protection for principles of federalism. *See Printz v. United States*, 521 U.S. 898, 953 n.13 (1997).

[6] While the Eleventh Amendment confirms the existence of the States' sovereign immunity, it "does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 753 (2002). *See also Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[S]overeign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment.").

STATEMENT OF THE CASE

1. In *Hood II*, this Court granted review "to decide whether Congress has the authority to abrogate state sovereign immunity under the Bankruptcy Clause." *Hood II*, 124 S. Ct. at 1915 (Thomas, J., joined by Scalia, J., dissenting). However, this Court ultimately decided *Hood II* on other grounds (*in rem* jurisdiction) and, thus, declined "to decide whether a bankruptcy court's exercise of personal jurisdiction over a State would be valid under the Eleventh Amendment." *Id.* at 1915 (Opinion of Court). Consequently, the issue that this Court desired to decide and that it needed to decide in order to resolve a deep and mature conflict among the Circuits went undecided.

This Petition presents an opportunity to resolve the exact same issue presented by *Hood II*. Indeed, in ruling against the Virginia Institutions' claim of sovereign immunity, the Sixth Circuit relied exclusively on its previous decision in *Hood I*.[7] *See App.* at 2.[8] More importantly, because this matter involves bankruptcy adversary proceedings seeking to recover alleged preferential transfers, there is no possibility that the case can be decided because of *in rem* jurisdiction. *See Hood II*, 120 S. Ct. at

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[7] Because this Court, in deciding *Hood II*, never addressed the correctness of the Sixth Circuit's rationale in *Hood I*, the reasoning of *Hood I* remains binding precedent in the Sixth Circuit. *See Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("We cannot overturn the prior published opinion of another panel and are therefore bound by these previous decisions."). As a result, the three-judge panel of the lower court had no choice but to follow *Hood I* and summarily affirm.

[8] Because the sole basis for the lower court's ruling was its decision in *Hood I*, this Petition, as a practical matter, is a request to review the reasoning of *Hood I*. Given that this Court has already expressed a willingness to review *Hood I*, it should grant this Petition.

1914 ("The case before us is thus unlike an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference."). Furthermore, while there is an argument that Virginia Military Institute waived its sovereign immunity,[9] there is no such argument with respect to the three community colleges.[10] Therefore, this Petition gives this Court an opportunity to decide the issue that it wished to decide, but could not decide, in *Hood II*.

[9] Regardless of whether Congress may use the Bankruptcy Clause to abrogate sovereign immunity, there is an argument that Virginia Military Institute's sovereign immunity was waived when one of its employees filed a proof of claim on its behalf. Resolution of the waiver question involves the following questions: (1) whether 11 U.S.C. § 106(b), which states that the filing of a proof of claim is deemed a waiver of sovereign immunity, is constitutional; (2) whether, as a matter of constitutional law, the filing of a proof of claim constitutes a waiver of sovereign immunity; and (3) assuming that filing a proof of claim does constitute waiver, whether the employee who filed the proof of claim had the authority to waive the institution's sovereign immunity. Because these issues were not addressed by the court below, this Court should decline to address them. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("[W]e generally do not address arguments that were not the basis for the decision below."). Rather, if this Court grants review and ultimately determines that Congress cannot use the Bankruptcy Clause to abrogate sovereign immunity, it should remand the claims against Virginia Military Institute to the Sixth Circuit for resolution of the waiver issues.

[10] Central Virginia Community College, New River Community College, and Blue Ridge Community College did not file proofs of claim. Thus, there is no waiver argument with respect to these institutions. If certiorari is granted, resolution of the claims against these institutions will require this Court to determine the central issue – whether Congress can use the Bankruptcy Clause to abrogate sovereign immunity.

That issue – whether Congress may use the Article I Bankruptcy Clause to abrogate sovereign immunity – divides the Circuits. Five Circuits have held that the States' sovereign immunity may not be abrogated for adversary proceedings in bankruptcy. *See Nelson v. La Crosse County Dist. Attorney (In re Nelson)*, 301 F.3d 820, 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1121 (9th Cir. 2000); *Sacred Heart Hosp. v. Department of Pub. Welfare (In re Sacred Heart Hosp.)*, 133 F.3d 237, 243 (3d Cir. 1998); *Department of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC (In re Fernandez)*, 123 F.3d 241, 243 (5th Cir.), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); *Schlossberg v. Comptroller of Treasury (In re Creative Goldsmiths of Washington, D.C.)*, 119 F.3d 1140, 1145-46 (4th Cir. 1997) (all holding that sovereign immunity has not been abrogated for adversary proceedings in bankruptcy). In contrast, the Sixth Circuit, in *Hood I* and in this case, held that Congress could use the Bankruptcy Clause to abrogate sovereign immunity and the States were not immune from bankruptcy adversary proceedings. *See Hood I*, 319 F.3d at 764-68. *See also App.* at 2 (stating that *Hood I* was controlling).

Moreover, by holding that "the Bankruptcy Clause operates differently than Congress' other Article I powers," *Hood II*, 124 S. Ct. at 1920 (Thomas, J., joined by Scalia, J., dissenting), the Sixth Circuit directly contradicted this Court's previous statements that Congress' Article I powers could *never* be used to abrogate sovereign immunity. *See Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 364 (2001) ("Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78 (2000) ("In *Seminole Tribe*, we held that Congress lacks power under

Article I to abrogate the States' sovereign immunity. 'Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.'"); *Id.* at 80 ("Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals."); *Alden*, 527 U.S. at 748 ("[I]t is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court."); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 636 (1999) ("*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers."); *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) ("Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."); *Id.* at 73 ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). *See also Hood II*, 124 S. Ct. at 1920 (Thomas, J., joined by Scalia, J., dissenting) ("This Court has repeatedly stated that 'Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I.'"); *Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96, 105 (1989) (O'Connor, J., concurring) ("Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause . . . "); *Id.* at 105 (Scalia, J., concurring) (stating his belief that Congress should not be able to use any of its Article I powers to abrogate sovereign immunity); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 42 (1989) (Scalia, J., joined by Rehnquist, C.J., O'Connor, & Kennedy, J.J., dissenting) ("[I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers. An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable.").

2. The factual and procedural background for this Petition is relatively straightforward. Wallace's Bookstores, Inc. operated college and university bookstores in a number of States. Each of the four Virginia Institutions did business with the company prior to it declaring bankruptcy. After commencement of the bankruptcy proceeding, the Respondent, Bernard Katz, who is the Liquidating Supervisor of the bankrupt estate, commenced adversary proceedings to recover alleged preferential transfers under 11 U.S.C. § 547(b), and to collect on accounts receivable that the debtor alleges are owed to it by the Virginia Institutions. The alleged preferential payments purportedly were made by the debtor pursuant to separate contracts with each of the Virginia Institutions.[11] The adversary complaints also allege that the Virginia Institutions, as unsecured creditors, should each be denied the

[11] Each contract states that Virginia law will control. Nevertheless, despite the fact that the contracts call for Virginia law, two of the adversary complaints also seek to recover alleged preferential transfers under a Kentucky preference statute. Virginia has no similar preference law.

right to any distribution from the bankruptcy estate on any proof of claim they might have filed.[12]

3. The Virginia Institutions moved to dismiss all of the adversary proceedings on sovereign immunity grounds. Had the litigation taken place in Virginia or in any other State in the Third, Fourth, Fifth, Seventh, or Ninth Circuits, the Virginia Institutions' motion to dismiss would have been granted. *See Nelson*, 301 F.3d at 832; *Mitchell*, 209 F.3d at 1121; *Sacred Heart Hosp.*, 133 F.3d at 243; *Fernandez*, 123 F.3d at 244; *Schlossberg*, 119 F.3d at 1145-46. However, because this litigation took place in Kentucky, which is part of the Sixth Circuit, the bankruptcy court was bound to follow *Hood I* and deny the motions. *App.* at 5-12.

4. The Virginia Institutions appealed to the district court which, also being bound by *Hood I*, held that sovereign immunity had been abrogated. *App.* at 4.[13]

5. The Virginia Institutions appealed to the court of appeals. The Sixth Circuit apparently delayed resolution of the appeal until after this Court decided *Hood II*. Once

[12] Only one institution, Virginia Military Institute, filed a proof of claim. It did so because it had no choice if it wished to recover more than $43,000 owed to it. The filing of a proof of claim by an unsecured creditor is required under Fed. R. Bankr. P. 3002 before the claim can be allowed under 11 U.S.C. § 502 and, therefore, before an unsecured creditor can receive any distribution from a bankruptcy estate in whole or partial satisfaction of that claim. Thus, if filing of a proof of claim is deemed a waiver of sovereign immunity, Virginia Military Institute faced the choice of waiving its sovereign immunity or surrendering its legal right to recover monies owed to it.

[13] Having concluded that sovereign immunity had been abrogated, the district court declined to address the issue of whether sovereign immunity had been waived for Virginia Military Institute. *App.* at 4.

this Court rendered its decision without resolving whether Congress could use the Bankruptcy Clause to abrogate sovereign immunity, *Hood II*, 124 S. Ct. at 1915, the court of appeals applied its decision in *Hood I* and affirmed. *App.* at 1-2. The court of appeals denied the Virginia Institutions' petition for rehearing *en banc*. *App.* at 13-14. This Petition follows.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a conflict among the Circuits on the issue of whether Congress may use the Article I Bankruptcy Clause to abrogate sovereign immunity. This is so for three reasons. First, the Circuits are divided on the issue. Five Circuits have held that the Bankruptcy Clause may not be used to abrogate sovereign immunity and one Circuit – the Sixth – has reached the opposite conclusion. Second, the Circuit conflict has serious consequences for the States. Depending upon where the adversary proceeding is filed, the States obtain immediate dismissal, are forced to expend resources litigating the issue of whether sovereign immunity has been abrogated, or have to litigate on the merits. Third, this Petition is an excellent vehicle for resolving the conflict among the Circuits. This matter cannot be resolved on the grounds of *in rem* jurisdiction or waiver of sovereign immunity.

I. THE CIRCUITS ARE DIVIDED ON THE ISSUE OF WHETHER CONGRESS MAY USE THE ARTICLE I BANKRUPTCY CLAUSE TO ABROGATE SOVEREIGN IMMUNITY.

A. The Five Circuits Holding that the Bankruptcy Clause May Not Be Used To Abrogate Sovereign Immunity

"I agree with Justice Scalia that Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause. . . ." *Hoffman,* 492 U.S. at 105 (O'Connor, J., concurring). *See also Id.* at 105 (Scalia, J., concurring) (Congress should not be able to use its Article I powers to abrogate sovereign immunity and emphasizing, "there is no basis for treating its powers under the Bankruptcy Clause any differently."). *Cf. Seminole Tribe*, 514 U.S. at 72 n.16 ("[I]t has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes."). To date, five Circuits – the Third, Fourth, Fifth, Seventh, and Ninth – have reached the same conclusion as Justices O'Connor and Scalia. *See Nelson*, 301 F.3d at 832; *Mitchell*, 209 F.3d at 1121; *Sacred Heart Hosp.*, 133 F.3d at 243; *Fernandez*, 123 F.3d at 244; *Schlossberg*, 119 F.3d at 1145-46. In doing so, these Circuits have relied on three propositions.

First, under the reasoning of *Seminole Tribe*, "Congress may *not* abrogate state sovereign immunity under its Article I powers." *Mitchell*, 209 F.3d at 1118 (emphasis original). *See also Nelson*, 301 F.3d at 831; *Sacred Heart Hosp.*, 133 F.3d at 243; *Fernandez*, 123 F.3d at 243; *Schlossberg*, 119 F.3d at 1145 (same). Moreover, "there is

simply no principled basis to distinguish the Bankruptcy Clause from other Article I clauses." *Sacred Heart Hosp.*, 133 F.3d at 243. *See also Nelson,* 301 F.3d at 831; *Fernandez,* 123 F.3d at 244. Indeed, the Bankruptcy Clause is inextricably linked to the Commerce Clause. *Fernandez*, 123 F.3d at 244. *See also The Federalist No. 42* at 239 (James Madison) (Clinton Rossiter, ed. 1961, 1999 prtg.) ("The power of establishing uniform laws of bankruptcy is . . . intimately connected with the regulation of commerce, ... "). *Cf. Hoffman,* 492 U.S. at 111 (Marshall, J., joined Brennan, Blackmun, and Stevens, J.J., dissenting) ("I see no reason to treat Congress' power under the Bankruptcy Clause any differently [than the Commerce Clause], for both constitutional provisions give Congress plenary power over national economic activity.").

Second, the fact that the Bankruptcy Clause, unlike other Article I Clauses, contains a uniformity requirement is constitutionally insignificant.[14] *Nelson*, 301 F.3d at 834; *Mitchell*, 209 F.3d at 119; *Sacred Heart*, 133 F.3d at 243; *Fernandez*, 123 F.3d at 244; *Schlossberg*, 119 F.3d at 1145-46. Relying on Justice Frankfurter's concurring opinion in *Vanston Bondholders Protective Comm. v. Green,* 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring), the Circuits repeatedly emphasized that "uniformity" does not require that the States be treated the same as private parties. Rather, "uniformity" simply means only geographic uniformity. *See Nelson,* 301 F.3d at 834; *Sacred Heart*, 133 F.3d at 243; *Fernandez,* 123 F.3d at 244.

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[14] The term "uniformity requirement" refers to the fact that the Bankruptcy Clause empowers Congress to establish "*uniform Laws* on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (emphasis added).

Moreover, those Circuits which had the benefit of this Court's decisions in *Federal Maritime Commission* and *Florida Prepaid* found that the States' sovereign immunity is not diminished even in areas where the National Government is given exclusive control. *Nelson*, 301 F.3d at 834 (interpreting *Federal Maritime Comm'n*); *Mitchell*, 209 F.3d at 1119 (interpreting *Florida Prepaid*).

Third, in addition to dealing with whether Congress' Article I powers could be used to abrogate sovereign immunity and the significance of the uniformity requirement, the Seventh Circuit dealt with an argument that, by surrendering their power to make bankruptcy laws in the Plan of Convention, the States necessarily surrendered their sovereign immunity for bankruptcy proceedings. The Seventh Circuit rejected this argument and observed:

> In *Seminole Tribe*, the Court noted that "under the rationale of *Union Gas*, if the States' partial cession of authority over a particular area [there, interstate commerce] includes cession of the immunity from suit, then their virtually total cession of authority over a different area [i.e., the Indian Commerce Clause] must also include cession of the immunity from suit." In rejecting this rationale, and thus overruling *Union Gas*, the Court held, that "even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. These cases make clear that the States, by ceding certain enumerated legislative powers, did not relinquish their immunity from suit in those areas. And, as we have previously noted, there is nothing in these decisions indicating that bankruptcy should be treated differently than any other Article I power. While the ratification of the Bankruptcy Clause of Article I by the States illustrates that they clearly surrendered their power to enact bankruptcy laws, there is nothing in the text of that clause or in the structure of the Constitution indicating that the States consented to being sued in bankruptcy court. In other words, "the Eleventh Amendment . . . does not free [a State] from federal law, but simply the jurisdiction of federal courts."

Nelson, 301 F.3d at 833 (citations omitted). In other words, there is a fundamental difference between the States surrendering their sovereign authority to legislate in a particular context and the States surrendering their sovereign immunity from suit in a particular context. The fact that the States surrendered sovereign authority to legislate does not mean that the States surrendered immunity from suit.

B. The One Circuit Holding that the Bankruptcy Clause May Be Used To Abrogate Sovereign Immunity

Although the Sixth Circuit had the benefit of *Nelson*, *Mitchell*, *Sacred Heart Hospital*, *Fernandez*, and *Schlossberg* as well as this Court's decisions in *Federal Maritime Commission* and *Florida Prepaid*, it disagreed with Justices O'Connor and Scalia and held that the Article I Bankruptcy Clause could be used to abrogate sovereign immunity. Specifically, it concluded that the presence of the uniformity requirement in the Bankruptcy Clause meant that the States had surrendered *both* their sovereign authority to legislate and their sovereign immunity from suit. In reaching this conclusion, the Sixth Circuit

rejected the three propositions endorsed by the other Circuits.

First, unlike the Third, Fourth, Fifth, Seventh, and Ninth Circuits, the Sixth Circuit interpreted *Seminole Tribe* as leaving open the possibility that Congress could use some of its Article I powers to abrogate sovereign immunity. *Hood I*, 319 F.3d at 761-62. *See also Hood II*, 124 S. Ct. at 1920 (Thomas, J., joined by Scalia, J., dissenting) ("[T]he Court of Appeals held that the Bankruptcy Clause operates differently than Congress' other Article I powers because of its 'uniformity requirement.'"). Indeed, the Sixth Circuit declared that "neither *Seminole Tribe* nor any of the Supreme Court's other recent sovereign immunity cases address Congress's Bankruptcy Clause powers as understood in the plan of the Convention." *Hood I*, 319 F.3d at 761-62.

Second, unlike the other Circuits, the Sixth Circuit found that the uniformity requirement has constitutional significance. *Id.* at 763-64. As explained above, the other Circuits had interpreted the uniformity requirement as merely mandating geographic uniformity rather than uniformity of application. The Sixth Circuit rejected this interpretation. *Id.* at 763-64. Moreover, the other Circuits, interpreting *Florida Prepaid* and *Federal Maritime Commission,* concluded that a national legislative preference for uniformity could not be used to diminish the States' sovereign immunity. However, the Sixth Circuit found that the uniformity requirement was more than a mere legislative preference, it was a constitutional mandate. *See Id.* at 764-67. In the Sixth Circuit's view, "a federal bankruptcy system could cure the previous systems' ills only if it applied uniformly to all creditors and debtors. . . . " *Id.* at 767.

Third, unlike the Seventh Circuit, the Sixth Circuit determined that, at least in the bankruptcy context, the States could not surrender their sovereign authority to legislate without also surrendering their immunity from suit. *Id.* at 765-66. Relying on certain ambiguous phrases in both *The Federalist No. 32* at 166 (Alexander Hamilton) (Clinton Rossiter, ed. 1961, 1999 prtg.) and *The Federalist No. 81* at 455-56 (Alexander Hamilton) (Clinton Rossiter, ed. 1961, 1999 prtg.), the Sixth Circuit declared:

> The question is whether Hamilton's identification of the uniform powers as examples of categories in which states have ceded sovereignty includes the ceding of immunity from suit. We conclude that *No. 32* does in fact refer to the ceding of sovereign immunity. Hamilton's cross-reference to this discussion in *No. 81*'s discussion of ceding sovereign immunity can only suggest that, in the minds of the Framers, ceding sovereignty by the methods described in *No. 32* implies ceding sovereign immunity as discussed in *No. 81*. There is no other explanation for his cross-reference in *No. 81*. Thus *The Federalist No. 81* and *No. 32* suggest that the states ceded their immunity by granting Congress the power to make uniform laws.

Hood I, 319 F.3d at 766. In other words, the Sixth Circuit interpreted the ambiguous writings of one Framer – Hamilton – and concluded that he believed that the States had ceded immunity from suit for bankruptcy proceedings. Because Hamilton may have believed it and because the Sixth Circuit's review of the Ratification Debates indicated no explicit discussion of bankruptcy suits against the States, the Sixth Circuit concluded that the Bankruptcy

Clause included the power to abrogate sovereign immunity. *Id.* at 766-68.

In sum, the Sixth Circuit disagreed with the other five Circuits on the following: (1) whether the Article I powers can be used to abrogate the States' sovereign immunity; (2) the significance of the uniformity requirement in the Bankruptcy Clause; and (3) whether the States' surrender of the sovereign authority to legislate on bankruptcy matters necessarily included a surrender of the sovereign immunity from suits in bankruptcy.

II. THE CONFLICT AMONG THE CIRCUITS HAS SERIOUS CONSEQUENCES FOR THE STATES.

This conflict among the Circuits on the issue of whether the Bankruptcy Clause may be used to abrogate the States' sovereign immunity has serious consequences for the States. This is so for two reasons.

First, state agencies and institutions face the possibility of litigation not only in their own State, but also in every other State of the Union. In the early Twenty-First Century, the States do business with private entities throughout the Nation. When one of those private entities declares bankruptcy and an adversary proceeding results, the States can be forced to litigate in other Circuits. Indeed, in the time since Katz sued the Virginia Institutions in the Eastern District of Kentucky, the Commonwealth of Virginia's agencies and institutions of higher education have been sued in the bankruptcy courts of the District of Delaware, the Northern District of Georgia, the Northern District of Illinois, the District of Maryland, and the Southern District of New York. Virginia's experience is common.

Second, the conflict over whether Congress can use the Bankruptcy Clause to abrogate sovereign immunity leads to different outcomes in different Circuits. It should not matter whether the State is sued in Lexington, Kentucky or Lexington, Virginia, or Lexington, Massachusetts. Yet, at present, it matters a great deal. In Lexington, Kentucky, where these proceedings were commenced, *Hood I* mandates a denial of sovereign immunity and the States must litigate on the merits. In Lexington, Virginia, where Virginia Military Institute is located, *Schlossberg* controls and the case is dismissed on sovereign immunity grounds. In Lexington, Massachusetts, where there is no controlling Circuit authority, the States have to litigate the sovereign immunity issue and, if unsuccessful, litigate on the merits. This difference in outcomes makes it impossible to consistently and efficiently administer State government with regard to responses in bankruptcy. It is intolerable.

III. THIS PETITION PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT AMONG THE CIRCUITS.

Moreover, this Petition provides an excellent vehicle for resolving this conflict among the Circuits. This is so for two reasons.

First, unlike *Hood II*, there is no possible resolution based on *in rem* jurisdiction. As explained above, Katz asserts that there was a preferential transfer and commenced adversary proceedings against the Virginia Institutions in an attempt to recover monies allegedly in the possession of the Virginia Institutions. As such, it is fundamentally different from the *Hood II* factual situation. *See Hood II,* 120 S. Ct. at 1914 ("The case before us is thus unlike an adversary proceeding by the bankruptcy

trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference.").

Second, unlike other attempts to obtain this Court's review of the Sixth Circuit's rationale in *Hood I*, this Petition cannot be resolved on the alternative grounds of waiver of sovereign immunity.[15] As explained above, although there is an argument that the Virginia Military Institute waived its sovereign immunity, there is no such argument with respect to the Central Virginia Community College, New River Community College, and Blue Ridge Community College. If this Court grants review and determines that Congress may not use the Bankruptcy Clause to abrogate sovereign immunity, then the claims against those three institutions will be resolved.[16]

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[15] For example, in *H.J. Wilson v. Comm'r of Revenue (In re Serv. Merch. Co.)*, 333 F.3d 666 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 2388 (2004), the Sixth Circuit, relying on *Hood I*, held that sovereign immunity did bar an adversary proceeding in bankruptcy. *H.J. Wilson*, 333 F.3d at 668. Massachusetts then sought review of the Sixth Circuit's rationale in *Hood I*. *See* Petition for Certiorari at 6, *Commissioner of Revenue v. H.J Wilson Co., Inc.*, (Dec. 9, 2003) (No. 03-879). However, the Respondent asserted that the correctness of *Hood I* was irrelevant because a proof of claim had been filed and the filing of a proof of claim constituted a waiver of sovereign immunity. *See* Respondent's Brief in Opposition to the Petition for Certiorari at 7, *Commissioner of Revenue v. H.J. Wilson Co., Inc.*, (Jan. 20, 2004) (No. 03-879). The presence of this waiver argument – which would constitute an alternative grounds to affirm and, thus, would allow this Court to avoid deciding the correctness of *Hood I* – presumably was a factor in this Court's denial of certiorari.

[16] Of course, as explained above in note 9, in such a situation, it will be necessary to remand the claims against the Virginia Military Institute to the Sixth Circuit for a determination of the waiver issue.

CONCLUSION

This Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

MAUREEN RILEY MATSEN
Deputy State Solicitor General

CARLA R. COLLINS
VALERIE L. MYERS
RONALD N. REGNERY
Associate State Solicitors General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for Respondent

December 29, 2004

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 03-6054

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In re: WALLACE'S BOOKSTORE, INC. and WALLACE'S BOOK COMPANY Debtors	)	
BERNARD KATZ, Liquidating Supervisor for Wallace's Bookstores, Inc., et al., Appellee, v. CENTRAL VIRGINIA COMMUNITY COLLEGE; VIRGINIA MILITARY INSTITUTE; NEW RIVER COMMUNITY COLLEGE; BLUE RIDGE COMMUNITY COLLEGE, Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (Filed Aug. 4, 2004)

Before: SUTTON and COOK, Circuit Judges; ROSEN, District Judge.*

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* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

PER CURIAM. Appellants, four state-supported institutions of higher education in Virginia, brought this suit for the purpose of challenging this court's decision in *Hood v. Tennessee Student Assistance Corporation,* 319 F.3d 755 (6th Cir. 2003) (holding that the Article I Bankruptcy Clause grants Congress the authority to abrogate states' sovereign immunity), *aff'd on other grounds,* 124 S. Ct. 45 (2004). The district court, finding that appellants raised the very arguments that this court rejected in *Hood,* affirmed the orders of the bankruptcy court. Because we are bound to follow a decision of a prior panel, *see Moltan Co. v. Eagle-Picher Indus., Inc.,* 55 F.3d 1171, 1176 (6th Cir. 1995) ("We cannot overturn the prior published decision of another panel and are therefore bound by these previous decisions."), and because the parties agree that *Hood* applies here, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 03-245-KSF*

IN RE
WALLACE'S BOOKSTORES,
INC., *et al.* DEBTORS
BANKRUPTCY CASE NO.
01-50545

CENTRAL VIRGINIA COMMUNITY COLLEGE APPELLANT

V. **ORDER**

(Filed Aug. 6, 2003)

BERNARD KATZ, LIQUIDATING
SUPERVISOR FOR WALLACE'S
BOOKSTORES, INC., *et al.* APPELLEE

ADVERSARY PROCEEDING NO. 03-5081

* * *

This matter is before the Court on appeal from several orders of the United States Bankruptcy Court for the Eastern District of Kentucky in the underlying adversary proceedings in this consolidated action denying the

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* This case has been consolidated with three related cases, with the present action as the lead case: *Virginia Military Institute v. Katz*, Civil Action No. 03-246-KSF (E.D. Ky.), *New River Community College v. Katz*, Civil Action No. 03-247-KSF (E.D. Ky.), and *Blue Ridge Community College v. Katz*, Civil Action No. 03-248-KSF (E.D. Ky.). For ease of reference, the Court will use the caption only for the lead action in its orders, although the orders apply equally to all parties in each of the consolidated cases.

appellants' motions to dismiss on the basis of sovereign immunity.

The appellants have sufficiently outlined the factual background and procedural history of these cases in their consolidated brief and, therefore, the Court will not repeat the same here. The constitutional issues raised by the appellants herein are identical to the issues raised by the appellants in *Hood v. Tennessee Student Assistance Corp.*, 319 F.3d 755 (6th Cir. 2003), *petition for cert. filed* No. 02-1606 (May 6, 2003). Thus, this Court must reject the appellants' appeal for the reasons set forth in the *Hood* decision and affirms the rulings of the bankruptcy court. Based on this, there is no need for the Court to address the argument of appellant Virginia Military Institute that the bankruptcy court erred in ruling that it had waived sovereign immunity by filing a proof of claim in the main bankruptcy case.

Accordingly, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that

(1) the orders of the United States Bankruptcy Court for the Eastern District of Kentucky entered April 24, 2003, and May 19, 2003, are AFFIRMED; and

(2) judgment will be entered contemporaneously with this order.

This 5/day of August, 2003.

/s/ Karl S. Forester
KARL S. FORESTER,
CHIEF JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(Lexington Division)

IN RE:
WALLACE'S BOOKSTORES, INC., *et al.*

DEBTORS — CASE NO. 01-50545

BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., *et al.* — PLAINTIFF

V. — ADV. NO. 03-5081

CENTRAL VIRGINIA COMMUNITY COLLEGE — DEFENDANT

ORDER MODIFYING ORDER DENYING DEFENDANT'S MOTION TO DISMISS

By Order of April 24, 2003, the Court overruled Defendant's Motion to Dismiss raising the sovereign immunity of the Commonwealth of Virginia, and required Defendant to file its answer to the Complaint within ten days thereafter. The Defendant moved for relief from the requirement that it make answer to the Complaint, provided that it appealed from the denial of its Motion to Dismiss within the permitted time. The Court having heard the arguments of the parties on May 15, 2003, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion is sustained to the extent that the Defendant is granted an extension of time in which to file an Answer, but is otherwise overruled. The Court's Order of April 24, 2003 is hereby modified as follows:

1. This is a core proceeding and this Court has jurisdiction to enter this Order pursuant to 28 U.S.C. §§ 157 and 1334.

2. Congress, through its enactment of 11 U.S.C. §106(a), expressly and within its Constitutional authority, abrogated the states' Eleventh Amendment immunity.

3. Defendant's Motion to Dismiss is hereby DENIED.

4. This is a final and appealable Order.

5. Defendant will [sic] fifteen (15) days from the date of entry of this Order in which to file an Answer to the Adversary Complaint, and ten (10) days from the entry of this Order in which to file a Notice of Appeal.

6. This Order modifies and supersedes the Order entered on April 24, 2003.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

(Lexington Division)

IN RE: WALLACE'S BOOKSTORES, INC., et al.	CASE NO. 01-50545
DEBTORS	
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., et al.	PLAINTIFF
V.	ADV. NO. 03-5068
VIRGINIA MILITARY INSTITUTE	DEFENDANT

ORDER MODIFYING ORDER DENYING DEFENDANT'S MOTION TO DISMISS

By Order of April 24, 2003, the Court overruled Defendant's Motion to Dismiss raising the sovereign immunity of the Commonwealth of Virginia, and required Defendant to file its answer to the Complaint within ten days thereafter. The Defendant moved for relief from the requirement that it make answer to the Complaint, provided that it appealed from the denial of its Motion to Dismiss within the permitted time. The Court having heard the arguments of the parties on May 15, 2003, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion is sustained to the extent that the Defendant is granted an extension of time in which to file an Answer, but is otherwise overruled. The Court's Order of April 24, 2003 is hereby modified as follows:

1. This is a core proceeding and this Court has jurisdiction to enter this Order pursuant to 28 U.S.C. §§ 157 and 1334.

2. Congress, through its enactment of 11 U.S.C. § 106(a), expressly and within its Constitutional authority, abrogated the states' Eleventh Amendment immunity.

3. Defendant's Motion to Dismiss is hereby DENIED.

4. Defendant shall have fifteen (15) days from the date of entry of this Order in which to file an Answer to the Adversary Complaint.

5. This Order modifies and supersedes the Order entered on April 24, 2003.

[SEAL]
Signed By:
William S. Howard
Bankruptcy Judge
Dated: Monday, May 19, 2003
(wsh)

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(Lexington Division)

IN RE: WALLACE'S BOOKSTORES, INC., et al.	CASE NO. 01-50545
DEBTORS	
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., et al.	PLAINTIFF
V.	ADV. NO. 03-5093 41
NEW RIVER COMMUNITY COLLEGE	DEFENDANT

ORDER MODIFYING ORDER DENYING DEFENDANT'S MOTION TO DISMISS

By Order of April 24, 2003, the Court overruled Defendant's Motion to Dismiss raising the sovereign immunity of the Commonwealth of Virginia, and required Defendant to file its answer to the Complaint within ten days thereafter. The Defendant moved for relief from the requirement that it make answer to the Complaint, provided that it appealed from the denial of its Motion to Dismiss within the permitted time. The Court having heard the arguments of the parties on May 15, 2003, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion is sustained to the extent that the Defendant is granted an extension of time in which to file an Answer, but is otherwise overruled. The Court's Order of April 24, 2003 is hereby modified as follows:

1. This is a core proceeding and this Court has jurisdiction to enter this Order pursuant to 28 U.S.C. §§ 157 and 1334.

2. Congress, through its enactment of 11 U.S.C. § 106(a), expressly and within its Constitutional authority, abrogated the states' Eleventh Amendment immunity.

3. Defendant's Motion to Dismiss is hereby DENIED.

4. This is a final and appealable Order.

5. Defendant will [sic] fifteen (15) days from the date of entry of this Order in which to file an Answer to the Adversary Complaint, and ten (10) days from the entry of this Order in which to file a Notice of Appeal.

6. This Order modifies and supersedes the Order entered on April 24, 2003.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(Lexington Division)

IN RE: WALLACE'S BOOKSTORES, INC., et al.	CASE NO. 01-50545
DEBTORS	
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., et al.	PLAINTIFF
V.	ADV. NO. 03-5093
BLUE RIDGE COMMUNITY COLLEGE	DEFENDANT

ORDER MODIFYING ORDER DENYING DEFENDANT'S MOTION TO DISMISS

By Order of April 24, 2003, the Court overruled Defendant's Motion to Dismiss raising the sovereign immunity of the Commonwealth of Virginia, and required Defendant to file its answer to the Complaint within ten days thereafter. The Defendant moved for relief from the requirement that it make answer to the Complaint, provided that it appealed from the denial of its Motion to Dismiss within the permitted time. The Court having heard the arguments of the parties on May 15, 2003, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion is sustained to the extent that the Defendant is granted an extension of time in which to file an Answer, but is otherwise overruled. The Court's Order of April 24, 2003 is hereby modified as follows:

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2. Congress, through its enactment of 11 U.S.C. § 106(a), expressly and within its Constitutional authority, abrogated the states' Eleventh Amendment immunity.

3. Defendant's Motion to Dismiss is hereby DENIED.

4. This is a final and appealable Order.

5. Defendant will [sic] fifteen (15) days from the date of entry of this Order in which to file an Answer to the Adversary Complaint, and ten (10) days from the entry of this Order in which to file a Notice of Appeal.

6. This Order modifies and supersedes the Order entered on April 24, 2003.

No. 03-6054

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

N RE: WALLACE'S BOOKSTORE, INC. AND WALLACE'S BOOK COMPANY, Debtors.	)	ORDER (Filed Sep. 30, 2004)
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., ET AL., Appellee, v. CENTRAL VIRGINIA COMMUNITY COLLEGE, ET AL., Appellants.	)	

BEFORE: SUTTON and COOK, Circuit Judges; and ROSEN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk